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In The

Supreme Court of the United States

October Term, 1991

RANDALL D. WHITE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ of Certiorari To The Appellate Court Of Illinois,
Fourth Judicial District

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation. NACDL is made up of more than 5,000 lawyers and 25,000 affiliate members. NACDL was formed more than thirty years ago to advance the study of criminal law, as well as to promote the expertise and integrity of criminal defense attorneys.

One of NACDL's most important objectives is to preserve individual rights and liberties established by the Constitution of the United States. NACDL seeks to ensure that all persons accused of crimes receive a fair trial, and that the wrongly accused are exonerated. There is no right more important to these objectives than the Sixth Amendment right to confront witnesses.

The Amicus Curaie Committee of NACDL has concluded that this case could have a great impact on the ability of jurors to accurately determine guilt or innocence in criminal trials. Due to the importance of this case, NACDL offers its assistance to this Court.

SUMMARY OF ARGUMENT

This Court has consistently, and wisely, interpreted the Confrontation Clause to prohibit prosecutors from substituting hearsay for the testimony of an available witness. While this rule is not without exception, it provides the presumption to be followed in considering the admissibility of hearsay at trial. Idaho v. Wright, 497 U.S. ___, 110 S.Ct. 3139, 3146-3147 (1990)(citing cases). The Illinois appellate court's conclusion to the contrary is unsupported by the decisions of this Court.

The adoption of a "juvenile exception" to the unavailability requirement of the Sixth Amendment would create confusion in the trial courts and therefore disparate treatment of defendants. Further, the

likelihood of conviction of innocent people would be substantially increased.

The Court has painstakingly analyzed the application of the unavailability requirement to cases involving established exceptions to the hearsay rule. The abolition of the unavailability requirement for juveniles is unprecedented; it would create confusion in the courts resulting in the disparate treatment of similarly situated defendants. The scope and application of this exception to the general rule would be undefined as to the age or maturity of the children to whom it applied, as well as the nature of the offenses which would be included. This Court must not open this Pandora's box of litigation.

Further, the elimination of the unavailability requirement on a broad

basis would have little benefit, while significantly damaging the certainty and accuracy of the fact finding process in the nation's trial courts.

The only benefit that could be derived from the elimination of the unavailability requirement would be to spare children who truly are the victims of crime from the anxiety of testifying in court. While testifying is unpleasant for any victim, child or adult, the experience frequently causes no undue distress for children. In cases in which a child would be traumatized by testifying before a defendant, this Court has already approved procedures that adequately protect the child, while preserving the integrity of the fact finding process. Maryland v. Craig, 497 U.S. ___, 110 S.Ct. 3157 (1990).

The damage to the search for truth caused by eliminating the unavailability requirement for juveniles would be profound and extensive. Due to the limited cognitive and perceptual abilities of children, as well as their susceptibility to suggestions from adults, the likelihood of inaccurate claims of abuse at the hands of a particular individual are greater for children than adults. The ability to confront and cross-examine therefore increases as the age of the accuser decreases.

Further, should the unavailability requirement be eliminated, the only Sixth Amendment standard for determining the admissibility of out-of-court statements by children would be the test of reliability. In Idaho v. Wright, the Court indicated, in dicta, that statements

by child declarants which fall within established exceptions to the hearsay rule should be deemed "reliable" for purposes of the Confrontation Clause.

The exceptions to the hearsay rule are based on logical conclusions that the circumstances surrounding the making of such statements render misrepresentation unlikely. The logical bases for these exceptions often apply weakly, if at all, to children. While an adult is unlikely to mislead a treating physician, a small child is unlikely to appreciate the significance of the doctor-patient relationship. The spontaneous utterance of a child is far more likely to be the result of fantasy than is the case with an adult.

The elimination of the unavailability requirement would provide a means and an

incentive for prosecutors to conduct trials based on hearsay. Children who are alleged victims of abuse will be sent for treatment, conveniently resulting in admissible evidence through expert witnesses. Innocent defendants will become the victims of erroneous accusations.

The dictates of the Confrontation Clause require that the decision of the Illinois appellate court be reversed. The Court must hold that the prosecution's duty to either produce the declarant or make a showing of unavailability is not a product of the age or maturity of the alleged victim, or the nature of the charged offense.

ARGUMENT

THE ELIMINATION OF THE UNAVAILABILITY REQUIREMENT FOR CHILDREN WOULD SEVERELY DAMAGE THE CONFRONTATION CLAUSE AND THE SEARCH FOR TRUTH IN CRIMINAL TRIALS

I. The lower court clearly erred in holding that witness unavailability is irrelevant to Confrontation Clause analysis

In interpreting the Confrontation Clause, this Court has never departed from the presumption that prosecutors must produce available witnesses whose statements will be admitted in support of conviction. In its most recent decision addressing this issue, the Court again stated that, "[I]n the usual case ..., the prosecution must either produce or demonstrate the unavailability of, the declarant whose statement it wishes to use

against the defendant." Idaho v. Wright, 497 U.S. ___, 110 S.Ct. 3139, 3146 (1990), quoting Ohio v. Roberts, 448 U.S. 56, 65 (1980). The Court also again made it clear that the Confrontation Clause will prohibit the prosecution from introducing hearsay which may be admissible under the rules of evidence. Id. at 3146.

The Illinois appellate court, which issued its opinion prior to the decision in Wright, was therefore clearly incorrect in its conclusion that witness unavailability is irrelevant to the Confrontation Clause. (J.A. 42). No further discussion on this point is necessary.

II. The unavailability requirement must apply equally to juveniles and adults

The Court in Wright declined to address the question of whether an exception to

the unavailability requirement may exist for hearsay statements made by children alleged to be victims of abuse. 110 S.Ct. at 3147. To design such an exception would be contrary to the Court's prior Confrontation Clause decisions, would create confusion and disparate treatment of defendants in trial courts, and would significantly increase the likelihood of innocent defendants being wrongfully convicted.

A. Confusion in the courts/disparate treatment of defendants

This Court has wisely refused any suggestion to create broad, untested exceptions to the unavailability requirement. The Court has instead carefully analyzed the application of this requirement to specific, tested and established exceptions to the hearsay

rule. In three decisions spanning a period of twelve years, the Court concluded that prosecutors may not substitute prior testimony for live testimony from an available witness. Ohio v. Roberts, 448 U.S. 56, 66 (1980); Mancusi v. Stubbs, 408 U.S. 204 (1972); Barber v. Page, 390 U.S. 719 (1968).

Similarly, in United States v. Inadi, 475 U.S. 387 (1986), the Court conducted a painstaking analysis of the applicability of the unavailability requirement to another well established hearsay exception, statements by co-conspirators. The Court reviewed the benefits and burdens to the parties that would result from requiring the prosecution to call co-conspirators to the witness stand. Id. at 394-400. Due to the peculiar nature of co-conspirators' statements, the Court

found the general rule of unavailability to be inapplicable. Id. at 399-400.

The Court must continue this carefully reasoned approach to defining the relationship between the Confrontation Clause and the hearsay rule, and, as in Ohio v. Roberts, "reject the invitation to overrule a near century of jurisprudence." 448 U.S. at 67, n.9. Should the Court attempt to fashion an unavailability exception for hearsay from children, years of confusion and disparate treatment of offenders will occur in the trial courts while attempts are made to define this unprecedented exception not only to the Sixth Amendment, but to the laws of the United States and England.

Courts would be forced to define the scope and limits of this exception to the unavailability requirement in an ad hoc

manner. Where would the exception begin and end? Would it apply only to cases in which a child was the alleged victim? If so, what offenses would fall within the scope of the exception? Would it be used in cases when a child witnesses a heinous crime against another? If the exception applied only to victims, would the result not be to allow the use of hearsay when the juvenile's testimony is crucial to the prosecution's case, while requiring confrontation when the young witness gives evidence of limited significance?

Would this new exception apply to all minors under a given age? Would it not be better to base the decision on the actual maturity of the individual child? Cf. Kentucky v. Stincer, 482 U.S. 730, 741, n.11 (1987), quoting Wheeler v. United States, 159 U.S. 523, 524 (1895). Would

the trial court be required to hear testimony to determine whether the child was sufficiently sophisticated or vigorous to withstand the stress of giving testimony? If so, would it not be best to employ the balance struck by the Court in Maryland v. Craig, allowing witnesses -- specifically found to face undue trauma should they appear in open court in a particular case -- to testify outside of the defendant's presence? 497 U.S. ___, 110 S.Ct. 3157, 3169 (1990).

These questions are not raised, and therefore cannot be answered, in the present case. Thompson v. Oklahoma, 487 U.S. 815, 838 (1988). Years, if not decades, of appellate decisions would be required to define and limit a "juvenile exception" to the unavailability requirement. Should the Court create such

an exception, it would head off on a path never before seen or contemplated, a path which would cut through the heart of the Sixth Amendment. Certainty and fairness would be replaced by puzzlement and disparity. The Court must avoid this departure from the well defined path created by well reasoned precedent.

B. Benefit versus burden analysis

Should any doubt remain as to the continuing validity of the unavailability requirement as applied to children, that doubt is cast aside by a balancing of benefits and detriments such as was conducted in United States v. Inadi, 475 U.S. at 394-400.

1. Benefit - Protection of juveniles

The only benefit that would come from allowing prosecutors to substitute hearsay

for live testimony would be the protection of minor witnesses from the anxiety of appearing in court. While the protection of children is a most legitimate concern, it cannot support such a broad restructuring of the Confrontation Clause.

First, there is no persuasive evidence that children find testifying any more disturbing than do adults in any given case. Kentucky v. Stincer, 482 U.S. at 746, n.20. If such compelling evidence existed, the Court, in Maryland v. Craig, would have had no reason to require that a witness be allowed to testify on a one-way video system only upon the presentation of compelling evidence that the specific witness would be traumatized by appearing before the accused in open court. 110 S.Ct. at 3169.

Secondly, the Court, in Maryland v. Craig, has already approved of a procedure which protects juveniles who would be significantly traumatized by testifying in court in the presence of the accused. Id. After the trial court makes such a finding with regard to a particular child, that witness is permitted to testify outside of a courtroom without seeing the accused. Id. Any remaining benefit that would arise from generally excusing minors from testifying is far outweighed by the damage that such a rule would cause.

2. Burden - Confusion/disparity

Should the Court created a "juvenile exception" to the Confrontation Clause, it will, as set forth at pages 13-15, above, cause years of confusion and attendant disparate treatment of persons accused of crimes involving children.

3. Burden - Wrongful convictions

a. Accusations by juveniles

A "juvenile exception" to the unavailability requirement would seriously damage trial courts' ability to serve the search for truth and the exoneration of the falsely accused. This exception would greatly increase the likelihood that the judicial system would accomplish that which it is designed to prevent -- the conviction and punishment of the falsely accused.

The potential for wrongful allegations are greater when the accuser is a child as opposed to an adult. While both may have discernible motives, such as hatred or jealousy, for making spurious claims against another, children are also subject to making such claims as a result of their

immature mental processes or the influence of incompetent or malevolent adults.[1]

Judge Lindsay Arthur, Senior Judicial Scholar for the National Council of Juvenile and Family Court Judges, noted some of the risks which arise when a young child is the alleged victim and key witness in an abuse prosecution:

> The first interview with the child is crucial. The credibility of the child must be determined. . . .If the interviewer comes on too strong, the child may suffer . . . trauma. If the interviewer is hostile, the child may close up. If the interviewer is suggesting or demanding, the child may parrot what the interviewer wants, then and afterwards. If the interviewer is too sympathetic, the child may exaggerate to get more sympathy.
>
> Children, more than adults, react to their questioners. They may be more concerned with what the questioner wants than they are with the actual facts. They may fear the questioner and not want to cross him. They may feel the questioner knows more of the facts than they do, so they adapt their version to his. They may respect the questioner and want to help him.
>
> Children, more than adults, are suggestible. Ideas can be planted in their heads, it may render all of their subsequent testimony inadmissible. If inaccuracies can be planted, innocent people may be hurt.

L.G. Arthur, Child Sexual Abuse: Improving the System's Response 15 (1989). See also G.S. Goodman, "The Child Witness: An Introduction", 40 Journal of Social Issues 1 (1984); L. Berliner and M.K. Barbieri, "The Testimony of the Child Victim of Sexual Assault", 40 Journal of Social Issues 125 (1984).

Studies have demonstrated that very young children are limited not only in

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[1]The author wishes to thank fellow NACDL member Gregory D. Smith, Esq., for his assistance in preparing this portion of the brief. Mr. Smith is the national chair of the American Bar Association/Young Lawyers Division Juvenile Justice Committee and also teaches criminal law and juvenile law at Austin Peay University in Clarksville, Tennessee.

their abilities to accurately relate past events, but also in understanding moral concepts such as being truthful while under oath. See, e.g., L. Kohlberg, "The Development of Children's Orientations Toward A Moral Order, 6 Vita Humana 11, 30 (1963); Woodbridge, "Physical and Mental Infancy in the Criminal Law", 87 U. Pa. L.R. 426, 429 (1939).

The limitations on children's abilities to discern right from wrong have long been recognized in the law. Blackstone acknowledged an irrebuttable presumption that children under the age of seven years are doli incapax (incapable of criminal intent) because of their limited ability to separate the permissible from the impermissible. W. Blackstone, 4 Commentaries on the Laws of England 21-24 (1769). This Court continues to recognize

that children cannot be expected to meet the same moral and ethical standards as adults. Thompson v. Oklahoma, 487 U.S. at 825, n.23.

Dangers of wrongful conviction are therefore increased when the alleged victim and key witness is a child. It is particularly important in such cases that the alleged victim appear before the jury where falsehoods may be uncovered through cross-examination.

b. Hearsay by juveniles

In Idaho v. Wright, 110 S.Ct. at 3149, the Court indicated, in dicta, that statements falling within firmly rooted exceptions to the hearsay rule will be deemed reliable for purposes of the Sixth Amendment regardless of whether the declarant is a child or an adult. Should the unavailability requirement be

eliminated for juveniles, any such hearsay statements would presumably be deemed admissible without further inquiry.

The same cognitive limitations which make children's allegations suspect apply to statements which fall within long recognized exceptions to the hearsay rule. The rationale supporting such exceptions is often lacking when the declarant is a child. For example, evidence is admitted under the medical diagnosis exception[2] based upon the reasonable premise that an individual will not mislead a physician charged with the victim's health and well being. 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶803(4)[01] (1990). While this premise is quite reasonable when applied to adults, it is highly unlikely that a child appreciates the

[2]Fed. R. Evid. 803(4).

importance of the physician-patient relationship. B. Mosteller, "Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment", 67 N.C.L. Rev. 257, 266 (1989).

Similarly, excited utterances[3] are deemed admissible because adults are expected to respond to similar startling events in comparable ways. Children find the world to be a far more astonishing place than do adults. Children are significantly more subject to fits of fantasy. In short, they may react to an exciting event which may be exciting, or may exist, only in the child's eyes.

It therefore again stands to reason that confrontation and cross-examination are more important when a witness is a minor. The unavailability requirement of

[3]Fed. R. Evid. 803(2).

the Confrontation Clause must apply, at the very least, with equal force to juveniles.

c. Trial by hearsay

Should the unavailability requirement be eliminated for hearsay from juveniles, prosecutors would be provided with a tool for conducting trials by hearsay. Undoubtedly, public and political pressure would encourage the use of that tool in virtually every case.

Children who are the subject of alleged abuse are treated by medical professionals. It would require little, if any, prodding by a zealous prosecutor or police officer to create evidence admissible under the medical diagnosis exception to the hearsay rule. The allegations could then be presented to the jury not by a child who may not convince,

but by a qualified medical expert. It requires a small step indeed for jurors to infer that this expert would not repeat a child's claims without being confident of their veracity. This circumstance comes far too close to allowing expert testimony on the credibility of a crucial witness. See, e.g., United States v. Candoli, 870 F.2d 496, 506 (9th Cir. 1989); United States v. Cecil, 836 F.2d 1431, 1442 (4th Cir.), cert. denied, 487 U.S. 1205 (1988)(citing cases). Convictions of innocent people are certain to follow.

CONCLUSION

Our society abhors crimes against children, and properly so. This truism requires that special care be taken to see that the innocent are not falsely convicted of such crimes.

Confrontation and cross-examination may not always be sufficient to overcome false accusations by a confused child who, with or without the influence of an incompetent examiner or malevolent parent, has placed the weight of the government against one who has done no wrong. Confrontation and cross-examination remain, however, the finest instruments for the prevention of a wrongful conviction. They must not be removed from the Constitution simply because an alleged victim happens to be of tender years.

It is therefore respectfully submitted that this Court must reverse the judgement of the lower court and hold that the prosecutor's duty under the Confrontation Clause to either produce the declarant or make a showing of unavailability does not vary with the age or maturity of the

declarant, or with the nature of the charged offense.[4]

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[4]The author wishes to thank Robert Hoffman, an NACDL member and third year student at the University of Arizona College of Law, for his valuable assistance in the preparation of this brief.